

The Honorable Benjamin Settle

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

SHAMARICA D. SCOTT and LINDA A.  
WILSON,

Plaintiffs,

v.

THE EVERGREEN STATE COLLEGE;  
JENNIFER SCHOOLER; and DOES I  
through X,

Defendants.

NO. 3:17-cv-05823-BHS

DEFENDANT'S MOTION TO  
DISMISS UNDER FED. R. CIV. P.  
41(b) FOR PLAINTIFF LINDA A.  
WILSON'S FAILURE TO  
PROSECUTE

**NOTE ON MOTION CALENDAR:  
December 21, 2018**

**I. RELIEF REQUESTED**

Contrary to her obligations as party in this case, Plaintiff Linda Wilson has failed to respond to Defendants' repeated efforts to schedule her deposition. Her failure to respond to Defendants deposition requests led her attorney to withdraw her representation of Ms. Wilson earlier this year and continued after her attorney's withdrawal, despite Defendants' efforts to contact her directly. Accordingly, Defendants Evergreen State College and Jennifer Schooler, by and through their counsel, move to dismiss Plaintiff Wilson and her claims against them with prejudice, pursuant to Federal Rule of Civil Procedure 41(b), for failure to prosecute her lawsuit.

## II. FACTS IN SUPPORT OF MOTION

Ms. Wilson was one of two plaintiffs who filed this lawsuit, through plaintiff's counsel Ada Wong, on October 18, 2017. Dkt. 1; Dkt. 5. Defendants answered the lawsuit in November 2017, asserting several affirmative defenses, including Eleventh Amendment immunity for some of the claims. Dkt. 10.

This summer, the parties began scheduling party depositions, and Defendants asked to schedule the depositions of Plaintiffs Shamarica Scott and Linda Wilson. Declaration of El Shon Richmond, ¶ 2. After unsuccessfully attempting to contact Ms. Wilson to schedule her deposition, Ms. Wong filed a Motion for Leave to Withdraw as Counsel for Plaintiff Linda Wilson on July 20, 2018, due to Ms. Wilson's failure to respond to Ms. Wong's numerous attempts to contact her. Dkt. 25. On August 30, 2018, this Court granted Ms. Wong's Motion for Leave to Withdraw. Dkt. 28. On September 4, 2018, Ms. Wong filed a Notice of Withdrawal as Counsel for Plaintiff Linda Wilson. Dkt. 29.

Within days of Ms. Wong's withdrawal, Defense counsel followed up with telephone calls and voice mails to Ms. Wilson's last known telephone number, asking Ms. Wilson to contact him regarding the lawsuit. Richmond Decl. at ¶ 3. Those calls and voicemails went unreturned. *Id.* On September 27, 2018, Defense counsel sent Ms. Wilson a letter to her last known address asking to schedule her deposition and asking whether she wished to pursue her claims in this case, via regular US Mail and Certified Mail. Richmond Decl. ¶ 4. The U.S. Postal Service returned both letters in October as "unclaimed." *Id.*

## III. EVIDENCE RELIED UPON

This motion is based upon the pleadings in the Court file, the Declaration of El Shon Richmond in Support of Defendants' Motion to Dismiss Under Fed. R. Civ. P. 41(b), and the authorities cited herein.

#### IV. AUTHORITY

Federal Rule of Civil Procedure 41(b) states that “If the plaintiff fails to prosecute . . . , a defendant may move to dismiss the action or any claim against it.” Additionally, “[u]nless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits.” *Id.* A dismissal for failure to prosecute under Fed. R. Civ. P. (FRCP) 41(b) is reviewed for an abuse of discretion. *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 650 (1991). “[A] district court is required to consider the following factors in deciding whether to dismiss under FRCP 41(b): ‘[1] the court's need to manage its docket, [2] the public interest in expeditious resolution of litigation, [3] the risk of prejudice to defendants from delay, [4] the policy favoring disposition of cases on their merits.’” *Id.* at 651 (quoting *Citizens Utilities Co. v. American Tel. & Tel. Co.*, 595 F.2d 1171, 1174 (9th Cir.)).

Under these factors, this Court should dismiss Ms. Wilson’s lawsuit for failure to prosecute. Plaintiff engaged in dilatory behavior by failing to make herself available to be deposed and failing to prosecute her case, despite Defendants and Plaintiff’s counsel’s repeated attempts to contact her. Declaration of Ada Wong, ¶ 2, 3, 4; Richmond Decl. ¶ 3, 4. Likewise, the public interest in expeditious resolution is not served by allowing Ms. Wilson’s claims to continue when Ms. Wilson has not acted reasonably to pursue her case or to meet her obligation to respond to Defendants’ deposition request.

Ms. Wilson’s failure to respond to appropriate requests for her deposition over the course of past several months have substantially prejudiced defendants ability to pursue its defense in this case, particularly where Defendants’ have now realistically lost the opportunity to depose Ms. Wilson before the expiration of the dispositive motion deadline on November 29, 2018. Additionally, this Court “may presume from the length of time that has elapsed between the events at issue here and the present, that [defendants’] ability to present its case has been prejudiced.” *Morris* at 652.

1 Finally, “[a]lthough there is indeed a policy favoring disposition on the merits, it is the  
 2 responsibility of the moving party to move towards that disposition at a reasonable pace.” *Id.*  
 3 Ms. Wilson has made it clear, through her inaction, that she has no desire to pursue her claims  
 4 in this lawsuit, and her behavior does not suggest that a disposition on the merits will vindicate  
 5 any public policy favoring such a disposition.

6 Alternative remedies will not alleviate the prejudice that the Defendants will suffer  
 7 because of the delay in these proceedings. Although the Court could theoretically sanction  
 8 Ms. Wilson for failure to prosecute, or order her to participate, these remedies would not change  
 9 the fact that Ms. Wilson has demonstrated an unwillingness to pursue her case. Any remedy  
 10 short of the dismissal of Ms. Wilson and her claims would tend to exacerbate the prejudice  
 11 already suffered by the Defendants, because any such remedy would further delay these  
 12 proceedings.

13 Although Defendants’ were not required to move this case forward for Ms. Wilson,  
 14 Defendants have nevertheless repeatedly attempted to contact her in an attempt to do just that.  
 15 Despite their attempts, Defendants have been unsuccessful at obtaining any response from  
 16 Ms. Wilson regarding her intentions for her claims, let alone her willingness to submit herself  
 17 for her deposition. Under these circumstances, the Court should exercise its sound discretion  
 18 and dismiss her claims suit with prejudice for failure to prosecute.

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**V. CONCLUSION**

For all of the foregoing reasons, Defendants respectfully request that the Court dismiss Ms. Wilson as a party to this case and dismiss all of her claims in this case against all Defendants, with prejudice, pursuant to Fed. R. Civ. P. 41(b). A proposed order accompanies this motion.

DATED this 28th day of November 2018.

ROBERT W. FERGUSON  
Attorney General

/s/ El Shon Richmond  
EL SHON RICHMOND, WSBA No. 26813  
Assistant Attorney General  
Attorney for Defendants

**PROOF OF SERVICE**

I certify that I served a true and correct copy of this document on all parties or their counsel of record on the date below as follows:

ADA K. WONG  
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of November 2018, at Olympia, Washington.

/s/ El Shon D. Richmond  
EL SHON D. RICHMOND  
Assistant Attorney General